SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

No. 1106

DEMPSTER BROTHERS, INC., ET AL., *Petitioners,*

v.

BUFFALO METAL CONTAINER CORPORATION, ET AL., *Respondents*

REPLY BRIEF FOR PETITIONERS

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We desire to clarify some of the points that appear to be misstated in the Respondents' Brief.

The Respondents refer to the decision of this Court in *Corona Cord Tire Co.* v. *Dovan Chemical Corp.* (1928), 276 U.S. 358, 48 S. Ct. 380, as accepting "uncorroborated oral testimony of a single witness". The case does not support the Respondents' proposition.

There is extensive discussion of corroboration as to the identity of the prior article, in the opinion of Mr. Justice Taft, on pages 380-383 of 276 U.S., pages 386-387 of 48 S. Ct. If there were any doubt about adequate corroboration of Dr. Kratz's testimony, this would have been disspelled by the statement which follows immediately after the sentence quoted in the Respondents' Brief, wherein the opinion describes Dr. Kratz's activities and testimony:

> "supported by the evidence of Dr. Russell, his chief, and by the indubitable records that are not challenged".
>
> (p. 382 of 276 U.S., p. 387 of 48 S. Ct.)

Therefore, the *Corona Tire* case, decided nine years before *Smith* v. *Hall,* is not in point.

The respondents urge that the rule requiring corroboration, so clearly expressed by this Court in *Smith* v. *Hall,* was not the rule of that case because the Court went on to find "uncontradicted evidence" of the identity of the prior use device, in support of the oral testimony.[1]

In *Eibel Process Co.* v. *Minnesota & Ontario Paper Co.* (1923), 261 U.S. 45, 43 S. Ct. 322, there was no docu-

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[1] "Hastings is abundantly corroborated by disinterested witnesses and contemporary photographs and publications describing it. The principal witnesses are Lieber, who furnished the money for the enterprise, Peabody, the electrical contractor who installed the fan and other electrical equipment of the incubator, and Hickox, manager of the local electric light company which supplied the current for the incubator. In 1912, Hickox took photographs of the incubator in operation, and prepared a written description of it. These were produced at the trial."

(p. 716 of 301 U.S.)

mentary corroboration of the oral testimony and the Court rejected it for that reason.[2]

The Respondents still argue that here there was corroboration for the oral testimony of Barnes and Bowles, notwithstanding that the Barnes documents were rejected by the Court of Appeals (footnote 4), and Mick's testimony was so completely lacking in corroborative value that it was not even mentioned by either Court below.

The Court of Appeals found no corroboration, but accepted the uncorroborated oral testimony of both Barnes[3] and Bowles[4] as to the identity of the prior use devices. This is insufficient in law.

Mr. Barnes' identification of a photograph of a different device, as allegedly taken in May, 1956, is no more acceptable proof than was his identification of the 1963 photographs. Since there was no other proof

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[2] "It is true that some witnesses testify that they realized, before Eibel's application, that speeding up the stock to equal velocity with the wire would solve the difficulty and aid the speed. *But there is not a single written record, letter, or specification of prior date to Eibel's application that discloses any such discovery by any one, or the use of the pitch of the wire to aid the speed of the machine. The oral evidence on this point falls far short of being enough to overcome the presumption of novelty from the granting of the patent.* The temptation to remember in such cases and the ease with which honest witnesses can convince themselves after many years of having had a conception at the basis of a valuable patent, are well known in this branch of law, and have properly led to a rule that evidence to prove prior discovery must be clear and satisfactory. Barbed Wire Patent Case, 143 U.S. 275, 284, 12 Sup. Ct. 443, 36 L.Ed. 154; Loom Co. v. Higgins, 105 U.S. 580, 591, 26 L.Ed. 1177." (Italics ours)
(p. 60 of 261 U.S., p. 327 of 43 S.Ct.)

[3] "Barnes testimony was credible, notwithstanding inconsistencies."

[4] "Bowles' deposition provides additional proof of prior art."

to confirm the date of the photograph allegedly taken in May, 1956, and the District Court admitted it only as exemplary of the oral testimony, this clearly is not corroborative.

The Respondents' argument here that there was corroboration was rejected by the Court of Appeals which, nevertheless, affirmed the acceptance of uncorroborated oral testimony of a single witness as to the identity of the prior use device, Barnes as to one device; Bowles as to another; and Livesley as to a third device. These clearly are insufficient under the rule of law of this Court and of at least five Circuits.

Insofar as the decision below rejected certain of the claims of the patent in suit for obviousness, it acted contrary to this Court's decision, subsequently announced in *United States* v. *Adams,* 383 U.S. 25, 86 S. Ct. 708. That portion of the decision should be reversed on the authority of that case.

Respectfully submitted,

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